In The

Supreme Court of the United States

October Term, 1975

No. 75-995

INDEPENDENT MEAT PACKERS ASSOCIATION,
an unincorporated association,

Petitioner,

vs.

EARL L. BUTZ, SECRETARY OF AGRICULTURE,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Ben E. Kaslow and
Frank F. Pospishil of
Abrahams, Kaslow & Cassman
1175 Woodmen Tower,
Omaha, Nebraska 68102
(402) 341-4334,
Attorneys for Petitioners.

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

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The petitioner, Independent Meat Packers Association, plaintiff-appellee in the proceedings below respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on November 14, 1975. Respondents include the original defendants: Earl L. Butz, Secretary of Agriculture; Erwin L. Peterson, Administrator of the Agricultural Marketing Service of the Department of Agriculture and An-

drew Rot, Supervisor of the Meat Grading Branch of the Department of Agriculture at Omaha, Nebraska. Respondents also include the following parties which intervened in support of petitioner's Complaint: National Association of Meat Purveyors, National Livestock Feeders Association, National Restaurant Association, Consumer Federation of America, National Consumers League, Americans for Democratic Action, Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO) and American Federation of Teachers (AFL-CIO). Respondents also include American National Cattlemen's Association which intervened in support of the original defendants.

OPINIONS BELOW

The opinion on the merits issued by the United States District Court for the District of Nebraska on May 29, 1975, is reported at 395 F. Supp. 923 (D. Neb. 1975) and appears in the separate Appendix A hereto. The opinion of the Court of Appeals, not yet reported, appears in the separate Appendix B hereto. The opinion of the Court of Appeals concerning the temporary injunction issued by the District Court is reported at 514 F. 2d 1119 (8th Cir. 1975) (per curiam) and appears in the separate Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 14, 1975. A timely Petition for Rehearing En Banc was denied on December 15, 1975, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Are the proposed revised meat grading regulations which require mandatory yield grading of carcass beef, arbitrary, capricious and an abuse of discretion because of the failure of the Secretary of Agriculture to evaluate the impact of the present approximate 70% voluntary use of yield grading of beef carcasses submitted for quality grading, as it relates to the effect it has had on present cattle production, and for the further reason that such revised compulsory yield grading regulations do not disclose any rational basis for requiring the same?

2. Under the Federal Administrative Procedure Act, 5 U. S. C. § 706 (2), is a person adversely affected by administrative agency action, having been judicially authorized to pursue a plenary hearing, entitled to present evidence in addition to the record developed by the administrative agency, to demonstrate that the action taken by such agency is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?

3. Do the compulsory yield grading provisions of the proposed revised meat grading regulations which arbitrarily combine into one service the compulsory use of the quality and yield grading processes violate the letter and spirit of the express voluntary choice of the Federal meat grading service, as clearly expressed in the enabling statute identified as 7 U. S. C. § 1622 (h) and the regulations issued pursuant thereto?

4. Is the action of an administrative governmental agency which disregards the directives of an Executive Order of the President promulgated by authority vested in him by the Constitution and Laws of the United States subject to judicial review under the Administrative Procedure Act?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are involved in the resolution of this matter: (1) Constitution: United States Constitution, Article II, Section 3; (2) Statutes: 5 U. S. C. § 706, 7 U. S. C. § 1622, 12 U. S. C. § 1904, 21 U. S. C. § 601; (3) Regulations: 7 C. F. R. § 53.1, 7 C. F. R. § 53.4 and (4) Miscellaneous: 39 Fed. Reg. § 32743, 39 Fed. Reg. § 41501, 40 Fed. Reg. § 11535, Fed. Rules Civ. Proc. Rule 57, 28 U. S. C.

STATEMENT OF THE CASE

This suit was filed on April 1, 1975 by the Independent Meat Packers Association on behalf of its mem-

bers for declaratory and injunctive relief. The members of the Independent Meat Packers Association are meat packers subject to the provisions of the Agricultural Marketing Act of 1946, as amended, 7 U. S. C. §§ 1621 et seq., and the regulations promulgated thereunder particularly the standards for grades of carcass beef and slaughter cattle, 7 C. F. R. §§ 53.100-53.105 and 7 C. F. R. §§ 53.201-53.206. The Independent Meat Packers Association sought to enjoin the revised Official United States Standards for grades of carcass beef and slaughter cattle, 40 Fed. Reg. 11535, which were scheduled to become effective on April 14, 1975. Jurisdiction in the District Court was based upon a question arising under the Agricultural Marketing Act of 1946, as amended, 7 U. S. C. §§ 1621 et seq. and a declaration of rights pursuant to 28 U. S. C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. Jurisdiction was also conferred on the District Court by 28 U. S. C. § 1331, 28 U. S. C. §1337 and 5 U. S. C. §§ 702 and 706.

Under the Agricultural Marketing Act of 1946, as amended, the Department of Agriculture through the office of the Secretary of Agriculture is responsible for establishing grade standards for marketing livestock and meat, 7 U. S. C. § 1622. The purpose of the meat grading program is to facilitate the marketing of beef so that consumers may be able to obtain the quality product they desire, 39 Fed. Reg. 32743. Under this program eight grades are currently used to identify quality differences for beef. These quality grades include: Prime, Choice, Good, Standard, Commercial, Utility, Cutter and Canner, 7 C. F. R. §§ 53.201-53.206. The eight grade standards are designed to measure the marbling and maturity

of beef and the resultant palatability of beef. The United States Department of Agriculture's quality grading system has become an institutionalized part of the beef industry in the United States. Both government and private agencies report prices by United States Department of Agriculture grades and most livestock and meat transactions involve United States Department of Agriculture grades in price negotiation. The grades such as Prime and Choice have become recognized standards of quality which are readily identified in the marketplace. The proposed revised meat grading regulations provide among other things for a reduction in the marbling requirements for the choice grade and for compulsory yield grading of all carcasses which are offered for quality grading.

Yield grading does not measure the quality, tenderness or palatability of meat consumed by the public. This is the function of the quality grades. Instead, yield grading utilizes numerical grades, 1 through 5, to identify carcasses and wholesale cuts of beef for their relative yields of retail cuts. Yield grading is designed to measure the amount of fat on a beef carcass or a wholesale cut of beef. The yield grade for beef is determined by considering four characteristics: (1) the amount of external fat, (2) the amount of kidney, pelvic and heart fat (3) the area of the ribeye muscle and (4) the carcass weight, 39 Fed. Reg. 32743. At the retail level, the yield grade marking may be removed, and the consumer is unaware of its significance, if any. In its opinion, the District Court found that yield grading nearly doubles the time and expense of the grading process (App. A, p. 13). This problem of time and expense is particularly acute in meat packing operations which utilize a continuous, mechanical

producton line to slaughter and process beef. Presently some carcasses which obtain the highest quality grade will obtain the lowest yield grade because of the additional fat necessary to improve the quality of certain cuts of beef. This excess fat is trimmed by some meat packers to produce high quality cuts of prime and choice beef (App. A, p. 16). Compulsory yield grading as required by the proposed revised regulations eliminates any such trimming (App. A, p. 16). Historically, relative yield differences have been effectively adjusted in the marketplace between the meat packers and various wholesale purchasers with no need for further compulsory regulation from the United States Department of Agriculture.

When the revised regulations were issued, Executive Order No. 11821, 39 Fed. Reg. 41501 (App. D, pp. 4-6), provided, in part, as follows:

> Section 1. Major proposals for legislation, and for the promulgation of regulations or rules by any executive branch agency must be accompanied by a statement which certifies that the inflationary impact of the proposal has been evaluated. Such evaluation must be in accordance with criteria and procedures established pursuant to this order. . . .
>
> Section 3. In developing criteria for identifying legislative proposals, regulations, and rules subject to this order, the Director must consider, among other things, the following general categories of significant impact:
>
> a. cost impact on consumers, businesses, markets, or Federal, State or local government;
>
> b. effect on productivity of wage earners, businesses or government at any level;
>
> c. effect on competition;

d. effect on supplies of important products or services.

On January 28, 1975, the Office of Management and Budget issued Circular No. A-107 describing the requirements necessary to comply with the foregoing Executive Order (App. D, pp. 6-10).

On April 11, 1975, the District Court granted a temporary injunction enjoining the implementation of the proposed revised meat grading regulations. This decision was appealed to the Eighth Circuit Court of Appeals on April 15, 1975 and was affirmed (App. C, pp. 1-4).

Following two weeks of trial, on May 29, 1975 the District Court granted a permanent injunction against the implementation of the revised meat grading regulations (App. A, pp. 1-25). The District Court found that in promulgating the revised meat grading regulations there was material and substantial noncompliance with Executive Order No. 11821 and the regulations issued thereunder. The District Court further ruled that the USDA exceeded its authority insofar as the proposed revised meat grading regulations sought to require compulsory yield grading as part of the quality grading process. In its decision, the District Court also concentrated on deficiencies in the administrative record concerning the rationale for compulsory yield grading and specifically found as follows:

1. Plaintiffs' meat grading costs which annually equal approximately $170,000.00 (Exhibit #21) will roughly double under the new regulations (App. A, p. 13).

2. Some packers customarily trim fat while the carcass is on the kill floor. Any such trimming is pro-

hibited for graded carcasses under the proposed revised regulations (App. A, p. 16).

3. Cattle feeders customarily sell to packinghouses on a "live weight basis", meaning that a buyer examines the live cattle and agrees to pay a certain price per pound of live weight. There is no evidence in the administrative record or otherwise that the practice of selling on a live weight basis will change (App. A, pp. 16-17).

4. Cattle buyers are adept at assessing the yield grade of live cattle, and have at all times considered yield grades when arriving at an average price per pound (live weight basis) of a pen of cattle (App. A, p. 17).

5. For carcasses of the same quality grade, there is a price spread between carcasses having different yield grades. This price spread varies, depending on market conditions, and the exact figures are published on a daily basis in readily available market newsletters and the like (App. A, p. 17) and

6. There is no evidence in the administrative record which directly, or by inference, tends to show that consumer preferences will be reflected back through marketing channels to cattle producers to a greater extent under the new proposed regulations (App. A, p. 17).

The foregoing findings of the District Court clearly demonstrate deficiencies in the administrative record concerning the asserted rationale of the USDA for requiring compulsory yield grading. In this regard the USDA has repeatedly asserted that compulsory yield grading is necessary so as to create price signals to producers to encourage the production of leaner animals. However, the administrative record of the USDA significantly neglects to explain how these price signals are going to be com-

municated back to producers under the proposed revised regulations. Moreover, as indicated in the findings of the District Court, the administrative record also neglects to explain why the widespread use of yield grading at the present time, found by the Eighth Circuit Court of Appeals to involve 70% of the beef carcasses which are quality graded, has not already created the asserted price signals and thereby reduced the number of alleged excessively fat cattle which are slaughtered at the present time. These deficiencies in the administrative record strike at the very heart of the asserted rationale for requiring compulsory yield grading. The District Court found and articulated these deficiencies. The Eighth Circuit Court of Appeals failed to consider anything other than the solemn, although unsupported, pronouncements of the USDA. Based upon the foregoing findings, the District Court found that the proposed revised meat grading regulations were arbitrary, capricious and unreasonable measured by the standards of the Administrative Procedure Act.

Following the issuance of the permanent injunction by the District Court, the litigation was appealed to the Eighth Circuit Court of Appeals. On November 14, 1975 the Eighth Circuit Court of Appeals reversed the decision of District Court and dissolved the permanent injunction (App. B, pp. 1-27). Insofar as compulsory yield grading is concerned, the Eighth Circuit Court of Appeals based its opinion upon five key points as follows:

> a. There is no role for the judiciary in the implementation of Executive Order No. 11821 (App. B, p. 15).

b. The Secretary of Agriculture is authorized to combine yield grading with quality grading on a compulsory basis under the Agricultural Marketing Act of 1946, as amended (App. B, p. 17).

c. The District Court erred in conducting a *de novo* hearing (App. B, p. 27).

d. The revised regulations are not arbitrary and capricious because based upon a full review of the voluminous record there is a rational basis, which is not articulated in the opinion, to support compulsory yield grading (App. B, p. 27) and

e. Any hardship inherent in compulsory yield grading must be borne by meat packers because of the expected beneficial effects of the program (App. B, p. 26).

Significantly, the opinion of the Eighth Circuit Court of Appeals does not explain how the proposed compulsory yield grading is supposed to create price signals to producers. The opinion also does not explain why the widespread use of yield grading at the present time on a voluntary basis has not produced leaner cattle.

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REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari for the following reasons:

I.

There is no rational basis in the administrative record or elsewhere to require compulsory yield grading as part of the quality grading process.

The Court of Appeals erred in assuming there is a rational basis on the face of the administrative record or elsewhere to require compulsory yield grading as part of the quality grading process. In announcing its decision the Eighth Circuit Court of Appeals applied the arbitrary and capricious standard of review of the Administrative Procedure Act, 5 U. S. C. § 706 (2) (A), and stated as follows:

> To have the regulations promulgated pursuant to the notice and comment procedure of § 553 (c) set aside, the opponents must prove that the regulations are without rational support in the record (App. B, p. 18).

This same approach was utilized by this Court in *Bowman Trans. v. Arkansas-Best Freight,* 419 U. S. 281, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974) wherein this Court noted that an agency must articulate a rational basis between the facts found and the choice made.

Later in the opinion, the Eighth Circuit Court of Appeals stated:

> We have thoroughly reviewed the administrative record with certain explanatory evidence and conclude that the compulsory yield provision of the new regulations cannot be set aside as arbitrary and capricious (App. B, p. 27).

Presumably the Court of Appeals, aided by certain unspecified explanatory evidence, somehow found a rational basis for requiring compulsory yield grading. However, the nature of this rational basis is not explained by the opinion of the Court of Appeals. In this regard, it is only possible to surmise that the Court of Appeals apparently believed that compulsory yield grading would create

price signals that will induce producers to shift their resources to the production of leaner cattle (App. B, p. 23). Nowhere does the opinion of the Eighth Circuit Court of Appeals or the administrative record explain how these price signals are to be created. Moreover, nowhere does the opinion of the Eighth Circuit Court of Appeals or the administrative record explain why the widespread use of yield grading at the present time, found by the Court of Appeals to involve 70% of the carcasses which are quality graded, has not already created such price signals and thereby resulted in the production of leaner cattle. In fact, David Hallett, Chief of the Meat Grading Branch of the USDA, whose expertise was referred to in the opinion of the Court of Appeals acknowledged that the administrative record did not include any consideration of the impact of the present widespread use of voluntary yield grading (Tr. 1302). Because of these deficiencies in the administrative record which were specifically noted in the findings of the District Court, the District Court found ample reason to properly enjoin the proposed revised meat grading regulations. The reversal by the Court of Appeals of this decision in light of these deficiencies is clear error. This error should now be rectified by this Court,. As indicated in *Consumers U. of U. S. v. Consumer Product Safety Comm.*, 491 F. 2d 810 (2d Cir., 1974) there must be a reasoned basis for administrative action to avoid the prohibition of 5 U. S. C. § 706 (2) (A) of the Administrative Procedure Act. Moreover, the foregoing deficiencies in the administrative record lead to the next question concerning the proper scope of judicial review under the Administrative Procedure Act under these circumstances.

II.

The Court of Appeals misconstrued the applicable scope of review under the Administrative Procedure Act.

At a time in our historical development when the rule of law is undergoing severe tests of applicability in our system of jurisprudence, it appears prudent to carefully consider, or reconsider if one will, the role of judicial review under the Administrative Procedure Act vis-a-vis the burgeoning role of the administrative agencies, as they relate to essential aspects of the daily lives of the citizens of this Nation. Unlike issues that deal with special aspects of administrative control, the instant controversy involves questions that impinge on the daily welfare of virtually every household in the United States. When the Secretary of Agriculture through the instrumentality of the USDA assumes the prerogative to undertake a major alteration in a long standing, approved, acceptable and satisfactory method of operation, petitioner submits that such cause of action deserves strict compliance by the agency within the bounds of the applicable statutory limits and is certainly subject to judicial review.

Much has been said and written by the respondents concerning actions taken in conformance with rule making procedures, leading to the promulgation of the proposed major revised meat grading regulations, and the perfunctory publications thereof in accordance with federal requirements. However, as previously noted, not enough has been emphasized concerning the deficiencies of the respondent's position, as it relates to the parameters

enunciated in the opinion of this Court in the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 28 L. Ed. 2d 126, 91 S. Ct. 841 (1971). Basically, as previously noted, the respondents contend the proposed new USDA regulations, by removal of the present voluntary freedom of choosing quality grade or yield grade slaughtered beef, and substituting enforced combined grading of quality and yield, whenever meat grading is requested, will result in the reduction of fat cover on animals acquired for slaughter. Currently, it was established by evidence elicited, that approximately 70% of the graded beef is now voluntarily quality graded and yield graded. Why then as previously noted has the USDA objective to reduce trimmable fat on beef not been partially fulfilled and why is the administrative record of the USDA virtually devoid of any investigation, or in depth inquiry concerning such incongruous result. Obviously, the District Court, having been mandated by a panel of the Eighth Circuit Court to hold a plenary hearing in this case (App. C, pp. 1-4), was forced to receive additional evidence to answer this vital issue. It required the guidelines of an *Overton Park* type hearing to extract the pertinent data, which was lacking in the administrative record. Under these circumstances the following quote from *Concerned Residents of Buck Hill Falls v. Grant*, 338 F. Supp. 394 (M. D. Penn., 1975), aptly summarizes the situation: . . . "an accumulation of paper work is not a substitute for legitimate scientific research." The plain and simple facts support the finding of the District Court that the USDA generated totally inadequate research to disclose the inconsistent failure of prevailing voluntary yield grading to engender effective

price signals to induce cattle producers to diminish the fat cover of marbled beef. Further additional testimony at the hearing demonstrated that the controlling factors dictating the length of cattle feeding are essentially supply and demand and current market quotations, not merely the weight of the animal.

It is difficult to reconcile the position the Court of Appeals has taken when it concurs readily with the principles enunciated in *Overton Park* with respect to the right of review and thereafter concludes that the District Court's compliance therewith was tantamount to holding a trial *de novo*. In its opinion the Court of Appeals acknowledged that deficiencies in the administrative record may require the production of additional explanatory evidence. In this regard, the Court of Appeals stated:

> In our view, unless an inadequate evidentiary development before the agency can be shown and supplemental information submitted by the agency does not provide an adequate basis for judicial review, the court in conducting the plenary review mandated by *Overton Park* should limit its inquiry to the administrative record already in existence supplemented, if necessary, by affidavits, *depositions or other proof of an explanatory nature*. (Emphasis added.) App. B, pp. 22-23).

However, after enunciating the foregoing rule, the Court of Appeals failed to address itself to the deficiencies in the administrative record cited by the District Court. Instead, the Court of Appeals held that the District Court, in receiving additional evidence "of an explanatory nature" to supplement the administrative record, had conducted a *de novo* trial and thereby committed

error. In this regard, the decision of the Court of Appeals is in conflict with the very precedents cited in the opinion of the Court of Appeals and the decision should properly be reversed by this Court.

III.

Mandatory yield grading as part of the quality grading process conflicts with the Agricultural Marketing Act, 7 U. S. C. § 1622 (h).

The Agricultural Marketing Act of 1946 authorizes the Secretary of Agriculture to promulgate rules and regulations to inspect, certify and identify the class, quality, quantity and condition of agricultural products when shipped or received in interstate commerce. The Agricultural Marketing Act of 1946 further specifically provides that no person shall be required to use the services provided by the Secretary of Agriculture, 7 U. S. C. § 1622(h). That portion of the revised regulations involved in this dispute which requires mandatory yield grading of any carcass offered for quality grading is in direct contravention to the prohibition of the Agricultural Marketing Act of 1946 described above, and the District Court correctly so found.

This is particularly true in light of the testimony elicited in these proceedings indicating that the use of quality grades is of virtual necessity in connection with the marketing of beef carcasses in today's market place, (T239, 1467, 1486, 1498 and 1107). Not only is quality grading a necessity to the meat packer by virtue of present day demands of the buying public, but there are also cities in the United States which require quality

grading by the United States Department of Agriculture as a condition precedent to selling meat in such jurisdictions (App. A, p. 15). For example the cities of Chicago, Illinois; Miami, Florida; Seattle, Washington; Ogden, Utah and St. Petersburg, Florida, require quality grading as a condition precedent to selling meat at retail within such municipalities (T1107). Chicago is particularly important because a significant portion of the production of the meat packers involved in this litigation is sold in the City of Chicago (T285, 383) (App. A, p. 15). Under these circumstances, the meat packer, especially the small meat packer, must have his beef carcasses graded by the USDA; and the USDA's proposal to require mandatory yield grading of all carcasses which are offered for quality grading is a clear violation of section 1622(h) of the Agricultural Marketing Act of 1946.

Furthermore, it should be noted that a beef carcass must be substantially altered from its original condition before it is eligible for a quality grade. It must be slaughtered, bled, skinned, eviscerated, beheaded, and chilled for twelve hours before it may be considered for a quality grade. Historically, as part of the slaughtering process, meat packers have developed various methods for handling beef carcasses so as to improve the final product. In recent times the use of hide pullers and the trimming of surface fat are examples of such procedures. Also, the USDA and Congress have utilized this slaughtering process as the workshop to implement the Federal Meat Inspection program, 21 U. S. C., § 601 et seq., with its attendant advantages and trimming for cattle grubs and bruises (App. A, p. 16). These procedures are read-

ily acknowledged to be advantageous to the entire beef marketing chain. Moreover, although these procedures presently may alter the surface fat of beef carcasses and thereby render such carcasses ineligible for yield grading, these procedures presently do not affect the eligibility of a beef carcass for quality grading (App. A, p. 16).

However, under the revised regulations requiring compulsory yield grading, these very production and sanitary procedures which are an integral, advantageous part of the process of preparing beef carcasses for sale and quality grading, will serve to disqualify some beef carcasses for yield grading and thereby eliminate the same carcass for quality grading (App. A, p. 16). Under the revised regulations the absurd result is possible whereby a prime carcass will remain ungraded to everyone's detriment due to trimming by the meat inspector from the USDA or the packer.

Furthermore, the opinion of the Court of Appeals overlooks the historical development of quality grading and yield grading as the two systems have developed in the meat packing industry. Since the advent of yield grading in 1965, yield grading has remained separate and apart from the quality grading and has been available on request by any packer on behalf of his customers. This system has evolved remarkably well and presently 70% to 75% of the beef which is quality graded is yield graded.

As pointed out in the District Court's opinion (App. A, p. 19), the voluntary, separate and distinct nature of quality grading as opposed to yield grading is recognized

by the Department of Agriculture's own construction of 7 U. S. C. § 1622(h) as follows:

> 7 C. F. R. § 53.1: *Grading Service.* The service established and conducted under the regulations for the determination and certification or other identification of the class grade *or* other quality of livestock or products under standards.
>
> 7 C. F. R. § 53.4: *Kind of Service.* Grading service under the regulations shall consist of the determination and certification and other identification, *upon request by the applicant,* of the class, grade, *or* other quality of livestock or products under applicable standards. (Emphasis added.)

Under these definitions, yield grading is categorized in the disjunctive as a separate service which is available upon request by the packer or other applicant. Under these circumstances, in view of the historical differences between quality and yield grading and in view of the practical production problems previously discussed, the District Court correctly found no necessity for compulsory yield grading and no resultant benefit from mandatory yield grading. The District Court also further correctly found that the mandatory yield grading requirements of the revised proposed regulations were in excess of the statutory authority extended to the Secretary under 7 U. S. C. § 1622(h) of the Agricultural Marketing Act of 1946.

IV.

The Court of Appeals erred in ruling that compliance with Executive Order No. 11821 by the USDA is not subject to judicial review.

In reviewing the revised regulations, the District Court found "material and substantial non-compliance with Executive Order No. 11821;" and accordingly, set aside the revised regulations pursuant to 5 U. S. C. § 706 (2)(A) (App. A, p. 23). However, the Court of Appeals found that there was no role for the judiciary in the implementation of Executive Order No. 11821 (App. B, p. 15). Thus, in the case at hand, involving a nationwide program of meat grading, this Court is clearly presented with the question of the proper scope of judicial review of agency compliance with Executive Order No. 11821. In view of the pervasive impact of administrative agencies on everyday life, this question is particularly timely.

Executive Order No. 11821 and the regulations promulgated thereunder (App. D, pp. 4-10) were issued pursuant to statutory authorization and pursuant to the President's power as Chief Executive. The District Court correctly found that Article II, Section 3, of the United States Constitution, by necessity, gives the President the power to gather information concerning the activities of administrative agencies (App. A, p. 21). The Congressional Declaration of Purpose of the Agricultural Marketing Act, 7 U. S. C. § 1621 specifically authorizes regulatory activities to the end that marketing may be improved and costs may be reduced. Moreover, Executive Order No. 11821 is specifically authorized pursuant to the provisions

of the Council on Wage and Price Stability Act, August 24, 1974, Pub. L. 93-387, 88 Stat. 750, 12 U. S. C. § 1904. The Wage and Price Stability Act gives the President the power, through the Council on Wage and Price Stability at Subparagraphs 6 and 7 of Section 3(a), to monitor the economy as a whole by requiring as appropriate, reports on wages, costs, productivity, prices, sales, profits, imports, and exports; and to review and appraise the various programs, policies and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation (App. D, pp. 2-3). Pursuant to Executive Order No. 11821, the Office of Management and Budget issued Circular Number A-107 dated January 28, 1975 (App. D, pp. 6-10) which sets forth in detail the requirements necessary to comply with Executive Order No. 11821.

After reviewing the purported compliance with the requirements of Executive Order No. 11821, the District Court found that the USDA, contrary to Executive Order No. 11821, did not consider the effect of the new regulations on productivity, competition, employment, energy resources or secondary markets (App. A, p. 22). The District Court further found that the USDA did not weigh the inflationary impact of alternative proposals or appoint a compliance officer as required by the Executive Order (App. A, pp. 11, 23). Significantly, the purported inflationary impact statement (Exhibit 901) cited by the District Court provided:

> An analysis of the impact of the grade change proposal was made by the Commodity Economics Division, Economic Research Service. *While the primary*

> *thrust of the study was not directed at assessing the inflationary impact of the proposal,* its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. (Emphasis added.) (App. A, p. 23).

This is a candid admission of noncompliance with the terms of Executive Order No. 11821 and the regulations promulgated thereunder and conclusively establishes the validity of the District Court's findings in this regard.

Of course, the law is clear that administrative agency action which is undertaken contrary to the established rules of the agency is unlawful and may be set aside. It is also clear that an executive order is binding upon an administrative agency. In *Brookhaven Housing Coalition v. Kunzig,* 341 F. Supp. 1026 (1972), the United States District Court for the Eastern District of New York, was confronted with a failure of the General Service Administration to comply with an executive order which required the consideration of the latest available information. Thereupon, the New York District Court held that the executive order was binding on the agency and private citizens had the right to judicially review agency compliance with executive orders. The Court described its ruling as a specific application of the general principle that administrative agencies may be required to adhere to their own rules, citing *Hammond v. Lenfest,* 398 F. 2d 705 (2d Cir. 1968). Many courts have recognized that settled law requires administrative agencies to comply with executive orders which have been lawfully issued. *Service v. Dulles,* 354 U. S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957), *Ricker v. U. S.,* 396 F. 2d 454 (Ct. Cl., 1968), *U. S. v. Messer Oil Corp.,* 391 F. Supp. 557 (1975).

Applying the foregoing rule to the case at hand, it is obvious that the decision of the Court of Appeals ignores this well recognized rule of law and such decision is in conflict with the controlling case law of other Circuit Courts and of this Court.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals in these proceedings.

Respectfully submitted,

BEN E. KASLOW
and
FRANK F. POSPISHIL
of Abrahams, Kaslow & Cassman
1175 Woodmen Tower
Omaha, Nebraska 68102
(402) 341-4334
Attorneys for Petitioners

Dated: January 11, 1976.